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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 518

MARGARET E. ALLRED ET AL.,
Appellants,

vs

H. L. HEATON ET AL.,
Appellees.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE 10TH SUPREME JUDICIAL DISTRICT OF TEXAS.

JURISDICTIONAL STATEMENT.

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OPINIONS BELOW.

The opinion of the Tenth Court of Civil Appeals of Texas is reported at 336 S.W.2d 251 and is set forth verbatim in appendix "A" to this Statement, which opinion includes the specific fact findings of the trial court. The Supreme Court of Texas wrote no opinion in refusing appellants' application for writ of error.

JURISDICTION.

This suit was commenced by appellants as plaintiffs in the 85th District Court of Texas, a court of general jurisdiction (Tex. Const., Art. V, Sec. 8), as an action for declaratory judgment under Article 2524-1, Vernon's Ann. Tex. Statutes; for injunction, for declaration of the invalidity of the exclusionary Resolution of the Board of Directors of the College, restraining enforcement thereof, and for related relief (Trial Trans. 12). The only authority to exclude women is the Resolution. The statutes of Texas are silent on the question. The sole ground of invalidity claimed is that such Resolution, on its face and as applied, is repugnant to the equal protection clause of the Fourteenth Amendment. The Texas Court of Civil Appeals, arbitrarily we believe, stripped the class action from this suit, though no complaint can be made here concerning that.

The trial court, though making favorable fact findings for appellants, declared the Resolution to be valid and denied appellants all relief sought, expressly stating that the court felt bound by the prior case of *Bristol* v. *Heaton*, 317 S.W.2d 86 (Tex. Civ. App. 1958—Writ of Error Refused, appeal dism., cert. denied 359 U.S. 230, 1959). Trial court judgment was affirmed by the Tenth Court of Civil Appeals, which entered and dated its judgment May 19, 1960, with orders on rehearing, overruling appellants' timely Motion for Rehearing, June 9, 1960 (Appendix "B").

Appellants' application for writ of error to the Supreme Court of Texas, timely filed on June 15, 1960 (Civ. App. Trans. 36), was refused, no reversible error, on October 12, 1960.

The Court of Civil Appeals thus became, in this case, the highest court of the State in which a decision could be had. *Panhandle Eastern Pipe Line Co.* v. *Calvert*, 347 U.S. 157.

Notice of appeal to this Court was filed in the Court of Civil Appeals on October 18, 1960 (Civ. App. Trans. 2, 37).

Jurisdiction of the Supreme Court of the United States to review the decision by direct appeal is conferred by 28 U.S.C, §1257(2). The directly attacked Resolution excluding women from the College is the equivalent of a statute of Texas and is given the force of Texas law. The following cases sustain jurisdiction of the Supreme Court to review the judgment below by direct appeal:

Hamilton v. *University of California*, 293 U.S. 245, 257-258.

Williams v. *Bruffy*, 96 U.S. 176, 183.

Atchison, Topeka & S. F. R. Co. v. *Public Utilities Comm.*, 346 U.S. 346, 348-9.

STATUTES INVOLVED.

Pursuant to Articles 2610 and 2613(6) of Vernon's Annotated Texas Statutes (See Appendix "C"), conferring government and control of the College upon the Board of Directors, all women are excluded by the Board under the following Resolution, which is attacked in this case:

RESOLUTION.

The question of allowing girls to take work in the College was discussed again and Judge White made a motion, which was seconded by Mr. Boothe, that the daughters of members of the College staff who have

already entered the institution be allowed to continue their courses of Study. This motion failed to carry and the minutes of the previous meeting on this subject were amended to read *that no girls should ever be admitted to the College* (Emphasis added).

This Resolution is dated September 3, 1925, and appears on page 46, Volume 6 of the Official Minutes of said Board of Directors, covering period June 5, 1925 to November 29, 1934, inclusive (R. 14).

The exclusionary Resolution was amended on February 23, 1926, Volume 6, page 66 of the above Minutes, as follows:

RESOLUTION.

On motion by Mrs. George, seconded by Mr. Schumacher, it was decided to permit girls to attend the summer school of the College (R. 15).

QUESTIONS PRESENTED.

1. Whether the Exclusionary Resolution of the Board of Directors of the Agricultural and Mechanical College of Texas which excludes women as a class from enrollment at the College as students, solely on grounds of sex, is repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution as it is applied to Margaret E. Allred, seeking a degree program in floriculture, which is offered at no other college or university in Texas.

2. Whether the Exclusionary Resolution of the Board of Directors of the Agricultural and Mechanical College of Texas which excludes women as a class from enrollment at the College as students, solely on grounds of sex, on its face is repugnant to the equal protection clause of

the Fourteenth Amendment of the United States Constitution.

3. Whether such Exclusionary Resolution is Repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution, as it is applied to the female appellants in this case.

4. Whether such Exclusionary Resolution violates the personal rights of the female appellants under the equal protection clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT.

The exclusionary Resolution of the College was directly attacked, on its face and as applied, as being repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution. Such was the entire burden of the case and the only questions raised. They were raised in appellants' trial pleadings (Trial Trans. 3, 8, 12). The trial court passed on the question (Trial Trans. 26). Points of Error were assigned raising the same questions by the women on appeal to the Court of Civil Appeals (Civ. App. Trans. 4-5); on Motion for Rehearing in that court (Civ. App. Trans. 9-10), and that appellate court recognized such theory as the sole ground of attack by appellants (Appendix "A"). The same Points of Error were raised by application for writ of error to the Supreme Court of Texas (Tex. Sup. Ct. Trans. 8-9).

The Agricultural and Mechanical College of Texas is one of the nation's leading land-grant colleges and is operated under the Morrill Act of 1862, as amended, with extensive Federal aid. 7 U.S.C., §301-308. There are 68 of these leading schools and Texas A. & M. is the only one

refusing admission to women (R. 17, 24). It has the highest endowment of any such college or university and has one of the highest endowments of all public institutions in the Nation—more than 100 million dollars in 1959 (App. Ex. 8, R. 26).[1] Only the University of Texas excells it in Texas in facilities and finance (R. 21, 29), the named two schools being far and away from all others in Texas in cost, curricula, prestige, scope and size. Enrollment, of course, is comparatively low because no women can be presently admitted. It is Texas' oldest state institution of higher education. There are 18 state-supported Texas Colleges, but none can be closely compared with Texas A. & M. and the University of Texas. About 1600 students are married (R. 51).

The name of the institution erroneously implies a small agricultural college, but it is actually the State College of Texas. A cursory examination of the school bulletins will correct such impression (App. Ex. 1, 1-A). The School of Arts and Sciences comprises 60.27% of the semester credit hours, with liberal arts comprising 37.02% thereof (R. 16). The great volumes and percentages of degrees in Arts and Sciences are shown, almost 50% of the degrees being in Arts and Sciences (R. 17, 68). The school offers 76 bachelor's degree programs, 260 master's-level programs, including 11 professional, and 192 doctoral-level programs (R. 19). No military degrees are offered (R. 16).

There are many degree programs offered at no other institution in Texas (R. 19-20), among them being Floriculture, a course desired by one appellant, Miss Allred (R. 6). The other two appellants desire courses offered elsewhere—but at distant places—in Texas (R. 7-8).

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1. Statistics of Land-Grant Colleges and Universities, Dept. of Health, Education and Welfare, Office of Education, year ended June 30, 1958, pp. 134-135.

While this school maintains a Corps of Cadets, only about half of the students are in any way connected therewith (R. 28). There are 3,588 students (mostly freshmen) in the cadet corps (R. 49) out of a school total of 7,091 (R. 31). Where the school emphasizes that it is one of seven state-supported military colleges in the Nation (R. 8-9), the official higher education directory shows that none of the other six are in Texas A. & M.'s category except one (Virginia Polytechnic Institute), and it is co-educational (R. 37, App. Ex. 6). Most of them are small, private schools and some admit women, even though they are principally military schools. Sixty-two of the 68 land-grant colleges and universities *require* R.O.T.C. (R. 39-42).

The school has always, with rare exceptions, excluded women (R. 9). It did not grow into a great and leading institution until fairly recent times (R. 69). Texas A. & M. is a military school in name only. At best it is military solely in the sense that it offers R.O.T.C. training to about half of its students, as an auxilliary course incidental to the main study.

THE QUESTION IS SUBSTANTIAL.

1. Though the Tenth Court of Civil Appeals of Texas did essentially pass on the Federal questions raised (336 S.W.2d at 258, 260) to the extent that a clear intent to sustain the Resolution excluding women was established, the court went out of its way to create and inject an unnecessary non-federal procedural ground. It held that the women must make personal application to the College for admission as a basis for adjudication of any constitutional questions raised (336 S.W.2d at 259, 260). This holding was made in direct conflict with the trial court's holding; in spite of the clear stipulations of all parties, the

agreements and evidence in the record, and in spite of the clear terms of the recorded Resolution itself.

The parties by agreement specifically stipulated that the women are excluded by reason of the attacked Resolution (R. 12-13). Yet the lower court still made an issue of it. In addition, the record shows without dispute that Miss Allred was expressly denied any consideration for admission (R. 45) and that women would in no event be considered for admission (R. 43-48). It is also shown that women have been consistently denied admission for many years (R. 9), and the recent case of *Bristol* v. *Heaton*, 317 S.W.2d 86 (Tex. Civ. App. 1958), shows the futility of any attempt by a female to register as a student, regardless of her qualifications.

Similar problems have been presented before on this question. The federal rule consistently recognizes that the law and equity never require a vain act, and that attempts to register under such circumstances is wholly futile and not a tenable prerequisite to a decision upon such a Federal constitutional question. *School Board of City of Charlottesville* v. *Allen*, 240 F.2d 59, 63, 64 (4th Cir. 1956); *Gibson* v. *Board of Public Instruction*, 246 F.2d 913, 914 (5th Cir. 1957).

The relief sought in this case is for judgment declaring the invalidity of the exclusionary Resolution under the Equal Protection Clause, right of women to be admitted to the College without unreasonable discrimination, right to be admitted *upon proof of qualifications*, and injunction restraining the College officials from enforcing the Resolution and discriminating against the women appellants. In view of the official public policy of the College and admitted facts too well-known and established for dispute, Appellants are entitled, on the record, to an adjudication of

their important constitutional questions. This exact procedure has been recognized and approved. *Whitmore* v. *Stillwell*, 227 F.2d 187 (5th Cir. 1955). Cf. *Jackson* v. *Rowdon*, 235 F.2d 93 (5th Cir. 1956). Formal admission applications would have been hopelessly futile under this state of facts and could have resulted in nothing but additional obstructions, as the State Court well knows.

The applicable law is elementary to this Court. The jurisdiction of this Court will not be subverted by obstructive devices or untenable non-federal grounds, and this Court applies its own standards and exercises its own judgment on such a question. *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773; *Staub* v. *Baxley*, 355 U.S. 313, 318-319; Cf. *Wolfe* v. *North Carolina*, ____ U.S. ____, 4 L. Ed. 2d 1650, 1657, 1665 (1960).

Moreover, this alleged non-federal ground strikes at the federal questions itself, is not wholly independent thereof, and is certainly untenable and essentially arbitrary. Under such circumstances this Court is not deprived of jurisdiction of federal Constitutional issues so clearly raised. *Enterprise Irrig. Dist.* v. *Farmers' Mutual Canal Co.*, 243 U.S. 157, 164; *National Asso. for Advancement of Colored People* v. *Alabama*, 357 U.S. 449; *Ward* v. *Love County*, 253 U.S. 17, 22.

We believe the question of women's educational status in our social order is one which gives rise to many unexamined misconceptions, and that opinions upon the subject are frequently ill-considered and often emotional, to the prejudice of women as a class in the field of higher education and to the Nation as a whole. The question is of great and lasting importance. Much of the discrimination lies behind the scene, though some, as here, is open and obvious. Until recent times the political and social struc-

ture of civilization had denied access to education to all but a privileged male few. To uphold a modern ideal of citizenship and then deny deserving classes of citizens the equal means of attaining it is difficult to justify in logic and is impossible to justify in democratic philosophy. Even if such attainment can not be guaranteed to all citizens, it should at least be the equal opportunity of all, on principles of constitutional equal protection. The value of higher education today is too great to be trifled with. No more important question can be presented than that of equality of opportunity in higher education for every American. Untenable jurisdictional grounds should not be permitted to cause judicial avoidance of these questions, raised in good faith by women obviously in need of education.

2. One of the appellants, Margaret E. Allred, seeks a degree program in Floriculture, which is offered at no other Texas institution of higher learning, public or private. There consequently results a situation where the State of Texas is offering education to men which is not afforded women in Texas, in a field which is obviously valuable and appropriate to women.

This course can be obtained only at Texas A. & M. College in the State (R. 19, 20, 21, 30). This is a valuable subject, which opens fields in the floral profession, floral management and in teaching fields related thereto. Floriculture is the cultivation of ornamental floral plants and related fields, one undoubtedly suited to women and most desirable as a female profession.

The College Bulletin (Ex. 1) sets out the programs in detail in this subject at pp. 83, 86, 95 and 279 thereof. It is offered at both graduate and undergraduate levels.

This phase of the case so clearly violates equal protection under the Fourteenth Amendment that extended

comment seems unnecessary. The holding of the Texas courts runs directly counter to the holding of this Court in the case of *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, and related cases, without consideration of the broadening effect of *Brown* v. *Board of Education*, 347 U.S. 483.

The *Gaines* case, involving racial discrimination in education, held as follows: (a) When a state furnishes a certain type of education or program—legal education in that case—it must furnish it to every qualified citizen where state laws operate. (b) Out-of-state tuition arrangements are not a sufficient answer to the requirement that the State furnish education within its boundaries and jurisdiction. (c) A limited demand for a type of education is immaterial, the Equal Protection Clause affording a personal right to every individual.

The above case was decided in 1938. Later related cases which we cite, and which are evolved from the *Gaines* rule are *Sipuel* v. *Oklahoma Board of Regents*, 332 U.S. 631; *Sweatt* v. *Painter*, 339 U.S. 629; and *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637.

The Texas Court of Civil Appeals would limit the effect of the Equal Protection Clause to the problems of race only (336 S.W.2d at 261). In a labored effort, wholly illogical and without merit, the lower court sought to distinguish the *Gaines* case, principally on the ground that race was involved instead of sex, and, oddly enough, that the desire of the women to attend Texas A. & M. College was "mixed" with other conditions, such as convenience, economy and an earlier desire to study another course (336 S.W.2d at 260). The record is clear that the ultimate motive is education, and it is clear that motives of convenience and accessibility are entirely immaterial so far as the law is concerned. The fact remains that women are denied

educational privileges which are given to men, and that the denial rests solely on grounds of sex. The question is most important in the changing world of 1960. The Texas courts have completely denied the protection of the Fourteenth Amendment to these women, in a manner which is the antithesis of established law as announced by this Court on the subject. Texas courts should not be allowed openly and wholly to subvert established law, especially when that law involves vital personal protections guaranteed by the United States Constitution. Without correction by this Court, wrong law will not only stand in Texas, but clear violations thereof will remain operative and actively enforced by the State of Texas.

3. It is not contended that women's right to higher education has not made great strides in America in the Twentieth Century, for it has. But it is a clear fact that there are yet areas of harmful discrimination, as the example here shows, where educational rights of women are regarded and evaluated as they were two hundred years ago. Correction of the evil requires legal compulsion, for the absolute exclusion and segregation of women has become to be regarded as a state right, without constitutional protection for women.

Intellectual training for some of the people, and vocational training and life-adjustment for the rest, is the epitome of a class-structured educational philosophy.

Those who preach it in the United States are simply repeating the arguments that have been used by opponents of democratic education in every age and in every country. These opponents have always asserted that the majority of women or certain racial groups either have no need for serious intellectual training, do not want it, or are incapable of receiving it, and that for them mere training for the job

or for menial traditional female roles will suffice. The democratic faith in equality being the faith that each individual shall have the equal chance and opportunity to succeed and to contribute whatever he or she is capable of contributing, is completely repugnant to the idea of unequal or differentiated educational privilege, and it can not in good conscience be justified under the Constitution, even as against a single person. Freedom of choice is essential to personal equality. Today, no system of higher education can be tolerated, even though it might provide some appealing degree of physical welfare, if it has no respect for the "inalienable rights of man". Controlled or class-regulated human destinies, in America can not be condoned. The necessities of democracy require that the myths concerning women be dispelled and their full potentialities utilized. Women must be convinced, and given an equal chance to prove, that they are really significant human beings in their own right, that they are not merely second-class or third-rate men, that they are not members of a minority or inferior group relegated solely to the lifetime role of helper or housewife, that they have dignified rights, privileges and obligations, and that they should enjoy the exercise of them as responsible members of the community. Belief that women now have equal educational and economic encouragement and opportunities is not realistic.

It is said that a large number of women do not actually desire equality, and that women can form no organized group to enforce their rights. If this is true, a special judicial duty exists to rescue the great mass of women who do desire and need equality. They will never get help in the rough market of political maneuver. The latter are truly the forgotten class unless this Court acts. The cry of "super-legislature" cannot correctly be made

when this Court enforces clear mandates of the Constitution. There is nothing vague about "equality" in this field.

Today only 11% of the families of the Nation earn in excess of $5,000.00 annually. The first material practical problem is that the expense of a college education is relatively great and prohibitive to most women if removal is required. Only about 40% of the high school graduates go to college, and this group includes less than half of those best qualified for such education. Thousands of qualified students fail to obtain college training for want of financial ability and motivation. Removal of these obstacles bears directly upon the merits of this case.

There are now about twenty-two million women in the Nation's working force, or about 35% of all adult women. Approximately 25% of these are listed as family heads or unrelated individuals not a part of a family group. Over four million more live with a family, but who must support themselves. One-third of the entire working force is women. Most of them must support or help to support themselves. Only about half of the people graduate from high school. Married women return to work as their children get older, and their reasons for working then become broader. Over half the women workers are married. Of all married women, about 30% are working. Cf. Appellants' Ex. 7. When a woman reaches age forty she still has an average of thirty-seven years of living to look forward to—more than her husband has in most cases. The need for educational equality is real and critical, and no woman should suffer cultural or economic disadvantages or an inferiority to men for lack of educational encouragement and opportunity. If women are required to move to distant schools, the practical result is that most of them get no higher education at all, and those who can do so

are placed under expensive and unnecessary hardships, if a good public school is otherwise available. Forty per cent of all college undergraduates are now over twenty-one years of age and the percentage is increasing. Married college students now constitute 22% of the total.[2] The U. S. Office of Education reports that 2,400,000 persons forty-five years of age or older are taking educational courses of some kind, and a total of about 8,000,000 adults of all ages are attending classes of various grades and types.

Studies show that the average high school graduate earns $165,000 in his lifetime, while a person with a bachelor's degree can reasonably expect lifetime earnings of about $268,000. Education in professional fields in many cases materially increases that figure.

Since 1947 the total of professional and technical employees has increased by 60%. In 1955 about one-half of all women between forty and forty-nine were employed.

For success today, a college degree has become a basic requirement. Unlike conditions of the past, such degree is no longer simply a help in competing for a good position and to earn a living. It is a requirement to enter the race *Lack of education is as great a factor as age itself in the failure of older workers to find jobs.*

This case, we submit, presents a question at the very foundation of human rights which has never in our time been critically examined judicially, and one which seems to fall clearly within the constitutional guarantee of equal

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2. Zolomek, *A Changing America* (John Wiley, 1959), Ch. 2; Bryson, *An Outline of Man's Knowledge* (McGraw-Hill, 1960), pp. 400-407; Packard, *The Status Seekers* (David McKay, N. Y., 1959), Ch. 24; Newcomer, *A Century of Higher Education for American Women* (Harper & Bro., 1959), pp. 40, 45, 128, 133, 140, 147-148, 180, 236, 240, 247.

protection, for total absence, in modern society, of any reason involving a state's police powers which could possibly alter the national guarantee of equal protection of "persons", or warrant any discriminations or "separate but equal" formulas against women in higher education. We say this in full realization that analogical extension or refusal to extend a rule of law, viz., the Segregation Decisions, is not an operation demanded by logic and that logic in no way restricts the introduction of new premises for new subject-matters, and that special legislation *for* women can be proper. But there are such things as first-order facts which are what they are independently of the beliefs of men, and which are the same in all cultures; and there are second-order facts which vary from culture to culture as the beliefs of persons vary. When this Court says that separate educational facilities are inherently unequal, the Court is stating a physical and metaphysical truth—a first-order fact regardless of what men think about it. The fact can not possibly be limited solely to a racial matter. So we know, as a first-order fact, that if the "separate but equal" theory is applied as between men and women in education, the educational facilities are inherently unequal, for the many reasons set forth in the Segregation Decisions, in the various briefs filed therein, and for kindred reasons.

On the other hand, whether the educational exclusion of women as above is related to the public safety, health, morality and general welfare, *i.e.*, the state police power, taken in its broad meaning to include the great public needs, and thus within the power of the state to regulate regardless of the federal requirement of equal protection of persons, is a second-order fact which might vary from person to person and from court to court under ordinary circumstances. But we categorically say this: if the state

is empowered to deny women admission to this major College, this Court will be required discriminately to hold that denial of these higher educational rights to some physically different classes of persons has a reasonable basis, by a rational process of reasoning, related to such a public police power need. This, in effect, means that some persons are not guaranteed equality before the law after all, while others are, in the most necessary field of life. Tradition and habit are not justly powerful enough to perpetuate inequality in this field. They are not superior to law and a living constitution.

The great value of an equal education and the harm of deprivation has been emphasized in the Segregation Cases. Can it be said that exclusions and discriminations are harmful to one group, but immaterial to another? Deprivation is just as harmful to a female as it is to a Negro. Loss or handicap is suffered in either event. The constitution cannot rightly protect one group and ignore the other. The right to an education is an individual matter —not a class matter.

It can hardly be said that the admission of women to the school could affect the public morals, for women cannot be said to promote immorality by their attendance of a school. They are admitted to other state schools. The public health could not be affected. The only way public peace or general welfare could be adversely affected is so far-fetched that it would seem to any normal mind to be unreasonable, as well as irrational, i.e., that the R.O.T.C. program at the school might be damaged if women attended the College. It would be indeed a travesty if the fact that women seeking study in the Schools of Arts and Sciences and Agriculture, wholly unrelated to the incidental R.O.T.C. program, could be said reasonably to af-

fect adversely the public peace or general welfare. Military training must be offered at all land-grant colleges under the Morrill Act. There are 52 of them classed as large and leading colleges and universities. The Texas school is the only land-grant school in existence which refuses to admit women. There are 50 departments in the college. Only two of them deal with military training. Courses in military training are required, as at other land-grant colleges, only for able-bodied boys under the age of 21 years with freshman or sophomore classification, but only two years of this training is required, incidental to the main education involved. The school does not offer any type of degree in military training. Civilian students usually equal the corps of cadets in number. Almost every major college or university in Texas offers similar R.O.T.C. training (R. 17-18). Only 50.6 per cent of the student body (3,588 out of a total of 7,091) are now enrolled in a military or R.O.T.C. course. If the above is sufficient for the State to invoke police power and exclude women as a class from appropriate study at this great and expensive school the equality of right of women to attend any state-supported school in the Nation could be defeated by sham or by the immaterial process of establishing an R.O.T.C. course at the particular school involved. We do not believe that the Supreme Court will subscribe to any such device to permit the State of Texas, in effect, to nullify the Equal Protection Clause as applied to the higher educational rights of women, especially when 3,503 students are exempt from R.O.T.C. and the cadet corps, and when it is only an auxiliary course for male freshmen and sophomores at best. Nor do we believe that the exclusion of women from the valuable training here offered will be justified on groundless, static historical principles or under any tautological principle of "excluding women

to establish all all-male school", because some people like the idea. What the crowd wants is not controlling. The same argument could be made for racially segregated schools, with added force in the South. If personal or class-favoritism and inequality can be practiced by the State solely because they are customary and popular and appeal to the "pride and prejudice" of the majority, first principles of American democracy are illusory, and personal constitutional guarantees are really of doubtful value. The Constitution cannot "lie down" to quiet a carping sectional majority.

The theory that personal equality can be denied solely because it is deemed "reasonable" by the State confuses the theory of due process with that of equal protection. Certainly the reasonableness here must conform or relate to the police power. Else the establishment of a privileged class of citizens or the practice of most any form of personal inequality might—and probably would—be termed reasonable by a majority, in the field of civil rights. All class privileges have impressive custom and tradition to support them, with the precedents of history. We cite the practice of segregations by nationality and race in Texas as examples. In such event, discrimination would accompany the "reasonableness" in every case. This kind of "reasonableness" conflicts with American First Principles.

The judicial tendency has been to apply certain principles of historical jurisprudence to women's rights as an easy answer. In many instances, historical jurisprudence has been criticized rightfully as opposing any improvements which do not run along the traditional historical lines, and it has led jurists to take accidents of legal history and pre-democratic philosophy for necessary principles or categories of universal law. Cf. 1 Pound, *Jurisprudence*,

p. 101 (West, 1959). In the context of the common law, women's rights were shamefully unequal and tenuous. We believe American ethics and ideals, through the Federal Constitution, have corrected or will correct much of this injustice. In the maturity of law and the lesson of history in its evolutionary sense, however, the merits of this case are recognized. Moreover, analytical, sociological, and philosophical jurisprudence are clearly on the side of the women in our advanced social order. The maturity of law recognizes that there must be equality of operation of legal precepts with emphasis on equality of opportunity to exercise one's faculties and to employ one's substance. In higher education at a major public university, sex is an educational irrelevancy. The watchwords are equality and security. Cf. 1 Pound, *supra*, p. 422. The court cannot justly construe the Equal Protection Clause as a declaratory provision or to be only an admonition of moderation when applied to women, and at the same time construe it to be an effective mandatory personal pledge to other groups and persons. But the worst of all is judicial failure to take notice of these rights when they are properly presented.

The American democratic principle of equality, which is also a principle of the United Nations, the President's Committee on Civil Rights and of UNESCO,[3] to which this Nation is officially committed, is one of equality of opportunity—that human beings, including the sexes, must be educationally equal before the law within the limits of aptitude, should have the same opportunity and encouragement for education, for making a living, for being productive, for freedom of expression and movement and

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3. Preamble and Articles 1 and 55, Charter of the United Nations, June 26, 1945; Huxley, *UNESCO: Its Purpose and Its Philosophy* (Public Affairs Press, Washington, 1948).

thought? Indeed, this equality is necessary if our economic system is ever to function equitably and fairly. Living costs and human problems recognize no sex or racial differences.

If government, through schools, especially in higher education, does not practice the fundamental principles of our democratic society, young men and women at impressionable ages will never properly respect or espouse the spiritual and legal principles of human freedom and equality. How can they? They will espouse the opposite. The goal of UNESCO which this Nation endorses in principle is well stated in part: "* * * the ideal of equality of educational opportunity without regard to race, sex or any distinctions, economic or social".

We do not seek to resurrect the discarded doctrine of *Adkins* v. *Children's Hospital*, 261 U. S. 525, or any similar doctrine of women's rights, where physical self-help is truly material. Physical equality of the sexes is truly "fictitious", in Justice Holmes' words. We know the fallacies of the *Adkins* arguments and their disastrous results. That case, and related ones, failed entirely to take into consideration physical differences of the sexes which are plainly the subject of police power in employer-employee relations, *i.e.*, differences in bodily strength to labor, bargaining power disparity, child-bearing functions as related to manual labor, and other reasons. We agree that cases such as *Muller* v. *Oregon*, 208 U. S. 412, *West Coast Hotel Company* v. *Parrish*, 300 U. S. 379, and *Gossaert* v. *Clearly*, 335 U. S. 464 are correct. But the right to classify women for appropriate purposes must not remain—or grow into—a broad license or label, authorizing classification for any purpose—only because they are women. Those cases relate to classifications of women for different purposes, upon different theories, and in entirely

different fields. The problems there were directly related to the public safety, health, morals, and general welfare. The rule here is clearly unrelated to the *Muller* and *Adkins* problems. There is no "fictitious" equality of men and women in education. The inequality is fictitious except in rare cases.

Antiquated grounds for classifications in education must be recognized for what they are. Dogmas and customs suitable to a pre-democratic, pre-technological social order and a pre-scientific age must be quickly and uniformly rejected. It is not within the prerogative of the State to say that one class of persons must be limited to a special mission in life at the expense of basic personal freedom and opportunity. Cf. *Bradwell v. Illinois*, 16 Wall. 130, for an amusing 19th Century view. These choices are for the individual, who knows better than anyone else his or her abilities, ambitions, desires and potentialities, including what educational courses to pursue and where he or she can best afford to obtain them and receive the most from the training offered. If there is a doubt, the doubt must be resolved in favor of expanded equality and liberty, and the concept of forced differentiation and state aid in status-seeking must be destroyed except when necessities clearly exist which require them. This Nation does not have time for gradual change in this field today. The experience of history, in the context of time and custom, must not delude us. Changes and advancement are now swift and dynamic. There is no time for the luxury of slow erosion of liberty-abridging customs which began in ancient social orders. The erosion has advanced as far as it will go without law enforcement.

With the exception of R.O.T.C. training and incidental physical education courses, there is not a single course or program at Texas A. & M. College which women do not

have the just right to pursue, for the same purposes and at the same values as received by anyone else. The only reason which can be assigned to justify the exclusion of women from education at Texas A. & M. College is custom or tradition. The military excuse is transparently false and unrelated to female discrimination.

Women's educational rights cannot be left to the courtesy or altruism of a political majority. They cannot be relied upon to afford the guarantees pledged in the United States Constitution, as we have officially understood since 1787.

The segregation here is imposed in one broad and arbitrary sweep. No attempt is made to conform it to reason, *e. g.*, to exclude certain married women, women over a certain age, or to impose like regulations, which conceivably could be related to police power.

The contention that an all-male institution is permissible as a public need because it diversifies the overall educational system is not rational. Similar arguments were made in the Segregation Cases. Intelligence and opportunity are not graded by or related to race or sex. Education cannot be diversified by the process of excluding intellectually qualified persons. It boils down to the practice of segregating and eliminating qualified students on the sole ground of physical difference wholly unrelated to education. This is outside the power of our democratic government, and presents no valid diversification of education. Diversification of people is the result. Such is the lawful role of private schools—not those operating by virtue of state law and financed with public funds belonging to all of the people.

Military schools whose central objectives are military training offer the classic example of lawful maintenance of

an all-male public institution. If there is any other valid example in this scientific age, with the exception of certain types of industrial schools, we do not know of any. In such case police power is applicable because of physical differences of the sexes as related to the objectives. The United States Military Academy, for example, is established under the national police and war powers. It is a bona fide military school offering only appropriate bachelor of science degrees (See 10 U. S. C. § 4353) with an obligation to serve as an officer in the United States Army upon graduation. It is a classified IIg school (Appellants' Ex. 6, pp. 12. 121). An examination of the Bulletins of the Texas School and its IVk classification remove any illusion concerning its incidental military status. If it is a military school, it is one part-time only for the corps of cadets, which comprises only about half of the student body.

As observed, maternal functions of women, which are additional functions, would seem to afford ample justification for operation of certain women's colleges with central educational objectives related to that and similar female functions. The police power is again applicable. Article 15 (3) of the Constitution of India, following American ideals, expressly recognizes that special provision may be made *for* women for such reasons, but not against them. Cf. *West Coast Hotel Co.* v. *Parrish*, *supra*, at p. 395. But this does not diminish or affect women's right to educational equality. It is an additional privilege belonging to her if she desires it.[4] The only "straight jacket" in which this action would place the State of Texas is that of equality of education, encouragement and opportunity for all qualified citizens, without arbitrary discrimination, the

4. Cf. *Special Reports, Clearinghouse of Studies on Higher Education* (U. S. Dept. of Health, Education and Welfare, April, 1960, Cir. 620), Special Report No. 24, p. 39.

express and avowed purpose of the Fourteenth Amendment.

If the State of Texas believes that non-classroom associations of men and women are improper at the school, we do not question its right to prohibit it. We recognize the prerogatives of the State to regulate disciplinary and administrative problems in any reasonable or necessary manner, regardless of wisdom. Some state colleges sharply separate the extracurricular activity of students. Cf. *Waugh* v. *University of Mississippi*, 237 U. S. 589.

CONCLUSION.

Self-improvement is difficult enough without handicaps imposed by government. Our ideals of liberty and equality must critically notice that the life of women in modern society is often regulated by a body of common sense formulated under economic and social circumstances of an earlier phase of development. The inequality involved in the case of the A. & M. College of Texas brings into focus only one aspect of discriminations against women which should not exist. Discriminations in the economic field show women generally receiving unequal pay for equal work, unequal employment opportunity and unequal encouragement to improve themselves. Women must have guaranteed equal educational encouragement and opportunities if their positions are ever properly to advance. Their right to choose subjective values and intellectual and professional associations are just as valuable to them as they were to Heman Sweatt. Cf. *Sweatt* v. *Painter*, 339 U. S. 629.

Woman's life, in its civil, economic, and social bearing can properly be a vicarious one, and she may properly

and normally assign herself to a sphere ancillary to the activity of the male throughout her life. But American concepts of liberty and equality pass to the individual woman the decisions concerning her personal status, whether she desires the vicarious life wholly or in part, or whether she desires to prepare herself for economic and professional attainment. Any other concept would destroy the American ideals of freedom and fairness. If two out of three women prefer to give up any chance of advancement by staying at home for a period of years, or permanently, this should not affect the opportunities of the third who chooses to remain in or return to the business or professional world. Political freedom cannot really endure unless it is accompanied by provision for the unlimited and equal acquisition of knowledge. A benevolent male-preferred social order will not do in 1960.

To say that women's educational equality is assured by the State because similar education is offered at distant state schools, is to lose touch with reality, to ignore practical problems, and to forget subjective values. Women are entitled to equality in all aspects of the higher educational process as well as equality in physical facilities and curricula. A leading land-grant college should never be withdrawn from any qualified citizen desiring to learn.

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such material public importance as to require plenary consideration.

Respectfully submitted,

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Box 587,
Bryan, Texas,
Attorney for Appellants.

APPENDIX A.

AFFIRMED MAY 19, 1960.

No. 3760.

MARGARET E. ALLRED et al., Appellants,

vs.

H. L. HEATON et al.

In the 10th Court of Civil Appeals of Texas.

Appeal from District Court, Brazos County.

Opinion.

This is an appeal from the judgment of the district court of Brazos County denying appellants an injunction against appellees for refusing admission to appellants to enroll in the Agricultural and Mechanical College of Texas. The cause was tried without the aid of a jury, and partly on stipulations filed to be made a part of the statement of facts. In the decree we find this recital:

> "Whereupon the plaintiffs moved in open court for leave to proceed with a class action, as well as for the plaintiffs individually, under Rule 42, T.R.C.P.; and the Court, after considering the motion and hearing evidence in support thereof, including the stipulations filed herein, in all things permitted the class action as a true and a spurious class action for the benefit of all Texas women similarly situated, as permitted by law; and defendants' special exception having been overruled by the Court, to which exception was duly made, all parties then announced ready for trial, subject to the special exception filed herein."

We quote the findings of fact and conclusions of law recited in the judgment:

"(a) That the Agricultural and Mechanical College of Texas is a land grant college established by State and Federal Law, fully owned and operated by the State of Texas.

"(b) That the plaintiffs are *bona fide* female resident citizens of the City of Bryan, of the State of Texas, and of the United States of America

"(c) That the plaintiffs each bring this action individually and as a class action under Rule 42 in good faith and that the degree programs and courses asked for here, at all times material to this case, are the genuine, lawful desire and to the best interest of each plaintiff under the circumstances.

"(d) That Mary Ann Parker desires to study at the College for a degree in Architecture; that Sarah C. Hutto desires to study at the College for a degree in Science with a major in Biology; and that Margaret E. Allred desires to study at the College for a degree in the program and courses in Floriculture at the School of Agriculture, as prescribed, all as undergraduates, that all requests and demands are real, genuine, and made in good faith for sufficient reasons.

"(e) That the College refuses to admit any women as students during regular sessions regardless of their qualifications or educational abilities, and that specific or detailed proof of educational qualifications by the usual application is futile and unnecessary for women in view of the involved Resolution of September 3, 1925, and the type of relief prayed for herein.

"(f) That plaintiffs have done all things reasonable or possible for admission while the exclusionary Resolution is being enforced and is effective; that they were advised by the Registrar that women would in no event be admitted to the College as students; and

that a real, genuine, and justiciable controversy exists between the plaintiffs and defendants, who are authorized and qualified presently to bring this suit, which is proper in form and substance.

"(g) That the College is suited and adapted for the education of women as well as of men, and the exclusionary Resolution is without reasonable relation to the educational objectives of the College.

"(h) That the military program at the College forms no reasonable basis for the exclusions of women from other courses of study in the School, since, *inter alia*, R.O.T.C. is necessarily offered only to certain young men, and about 3500 students of the College are now not required to study or be connected with military or air training.

"(i) That plaintiffs will be unreasonably deprived and damaged if they are required to remove to another place to obtain the college courses they desire and request at this school.

"(j) That the A. and M. College of Texas is the only institution in Texas offering degree programs in Floriculture, and that Margaret E. Allred is totally deprived of effective study and a degree or major in such field unless she leaves Texas to study.

"(k) That many courses and degree programs are offered at the College which are offered nowhere else in Texas, as listed in the stipulations and Statement of Facts herein, suitable and valuable to women as a class.

"(l) That plaintiffs and women as a class are barred *in limine* by the Resolution from fair and reasonable consideration for admission to the school solely because of their sex, causing any further attempt to enroll under present circumstances to be a vain and useless act.

"(m) That the nature, scope, and extent of the College are fully shown by its Graduate and Undergraduate Bulletins or catalogues introduced in evidence and the stipulations in evidence.

"(n) That women have been excluded from the school, with rare exceptions, except for summer instruction, since its beginning in 1876, but that the reasons for their exclusion no longer exist.

"(o) That women, especially the individual plaintiffs, are not accorded substantial equality in higher education by reason of the exclusionary Resolution, considering the extent, scope, cost, and nature of the A. and M. College of Texas and its offering of various courses obtainable nowhere else in Texas.

"(p) That except for the exclusionary Resolution the plaintiffs and women as a class would be able to present and determine their eligibility for admission as students fairly and with meaning.

"No implied fact findings are made against plaintiffs."

The decree is assailed on six points; they are substantially to the effect that the trial court erred in upholding as valid the exclusionary Resolution of the Board of Directors of the Agricultural and Mechanical College of Texas;

(1), attacked in this case, and thereby denying plaintiffs the relief sought, said exclusionary Resolution on its face being repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution:

(2) attacked in this case, and thereby denying plaintiffs the relief sought, said Resolution being repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution as it is construed and applied to the female plaintiffs and Texas women as a class;

(3) attacked in this case, said Resolution being repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution as it is applied to plaintiff Margaret E. Allred, seeking a degree-program in floriculture, which is offered at no other college or university in Texas;

(4) attacked in this case, said Resolution being repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution as it is applied to women as a class desiring to study the named subjects offered at no other state college or university in Texas;

(5) in denying the relief sought by plaintiffs under the Declaratory Judgment Act, Vernon's Ann. Civ. St., Art. 2524-1, *et seq.*;

(6) in denying the injunction restraining the defendants from enforcing the exclusionary Resolution, all necessary facts having been shown entitling plaintiffs to the relief sought as a matter of right.

A comprehensive statement is necessary. We quote paragraphs one through nine (also twelve) of the Stipulations:

> "1. Plaintiff, Margaret Elizabeth Allred, is 18 years of age, a resident of Bryan, Brazos County, Texas, and is presently attending Texas Technological College at Lubbock, Lubbock County, Texas. Margaret Elizabeth Allred desires to enroll as a student at the Agricultural and Mechanical College of Texas subject to her qualifications for entry other than sex. She desires to study as an under-graduate for a degree in floriculture. She desires to attend the Agricultural and Mechanical College of Texas to obtain that course of study and because it is more convenient and less costly for her than attendance at any other institution of higher learn-

ing because it is nearer her home. If she resided near any other senior State supported college or university in Texas, she would probably desire to attend the school nearest her home. In June, 1959, Margaret Elizabeth Allred made application for admission to a summer session of the Agricultural and Mechanical College of Texas and stated that the course of study she was pursuing or expected to pursue in the Agricultural and Mechanical College of Texas was law.

"2. Plaintiff, Sarah C. Hutto, is 22 years of age, divorced, with one minor child to support. She resides in Bryan, Brazos County, Texas, and is presently attending Allen Military Academy at Bryan, Brazos County, Texas. She desires to enroll as an undergraduate for a degree in biology as a major, subject to her qualifications for entry other than sex. She desires to attend the Agricultural and Mechanical College of Texas to obtain that course of study and because it is more convenient and less costly for her than attendance at any other school because it is nearer her home. If she resided near any other senior State supported college or university in Texas, she would probably desire to attend the school nearest her home.

"3. Plaintiff, Mary Ann Parker, is 39 years of age, married, has two children, one 17 years of age and one 11 years of age. She resides at her home in Bryan, Brazos County, Texas, with her husband, M. L. Parker, Jr., and their two children. She is not attending any college or university at the present time. She desires to study for a degree in architecture. She desires to attend the Agricultural and Mechanical College of Texas to obtain that course of study because it is more convenient and less costly for her than attendance at another institution of higher learning because it is nearer her home. If she lived near any other State supported college or university in Texas, she would probably desire to attend the school nearest her home. Her husband is in the general contracting business at

Bryan, Brazos County, Texas, and is part owner of Andrews-Parker, Inc., General Contractors. All three women plaintiffs are graduates of accredited Texas high schools.

"4. Defendant, M. T. Harrington, is Chancellor of the Agricultural and Mechanical College of Texas System. Defendant, Earl Rudder, is President of the Agricultural and Mechanical College of Texas. Defendant, H. L. Heaton is Director of Admissions and Registrar of the Agricultural and Mechanical College of Texas. Defendants H. B. Zachry, A. E. Cudlipp, L. H. Ridout, Price Campbell, Herman F. Heep, Eugene B. Darby, Sterling C. Evans, John Newton, and S. B. Whittenburg are members and constitute the Board of Directors of the Agricultural and Mechanical College of Texas.

"5. The Agricultural and Mechanical College of Texas is the oldest State supported institution of higher learning.

"6. The Agricultural and Mechanical College of Texas began operation in October, 1876, and has been in continuous operation since that time.

"7. The Agricultural and Mechanical College of Texas is one of seven State supported military colleges in the United States. It is the only State supported military college in the State of Texas. The military program at the Agricultural and Mechanical College of Texas differs from the reserve officers program offered at various other State colleges and universities. The participants in the military program at the Agricultural and Mechanical College of Texas are organized on a corps basis; the men are organized into military units and they are constantly under military discipline, twenty-four hours a day, seven days a week.

"8. The Agricultural and Mechanical College of Texas, since its beginning, has operated and been uni-

versally recognized and accepted as a school for the training and education of young men. The Board of Directors of the Agricultural and Mechanical College of Texas has governed the Agricultural and Mechanical College of Texas with the view that it was vested with discretionary power to exclude female students, and the Legislature of the State of Texas since the beginning of the Agricultural and Mechanical College of Texas has acquiesced in the Board of Directors' concept of its authority. Through the years the Board of Directors of the Agricultural and Mechanical College of Texas has passed a number of resolutions relating to the policy of excluding women from the Agricultural and Mechanical College of Texas. The Board of Directors of the Agricultural and Mechanical College of Texas has not altered its long observed policy of excluding women students from the regular sessions of the Agricultural and Mechanical College of Texas.

"9. The Texas system of higher education as it exists today is comprised of 18 institutions fully supported by State funds. Each of these institutions, with the exception of the Agricultural and Mechanical College of Texas and Texas Woman's University, is open to both sexes and has remained open to qualified members of each sex since the date of founding. * * *

"12. Pursuant to Articles 2610 and 2613(6) of the Texas Statutes, and pursuant to Texas law generally, conferring government and control of the College upon the Board of Directors, women are excluded as students by the Board, except for summer school instruction, under a Resolution or Regulations dated September 3, 1925, amended February 23, 1926, recorded in Volume 6, pp. 46 and 66, Official Minutes of the Board of Directors of the College, which regulations or resolutions have never been repealed, impaired, or rescinded, and they are still effective and enforced actions of the Board to date and at all times material to this suit, copies of said attacked Resolu-

tions or Regulations being attached hereto and made a part hereof."

On July 16, 1959, the Honorable John M. Barron, counsel for appellees, wrote Mr. Heaton, Director of Admissions, Texas A. & M. College, substantially as follows:

> Has there been any change or alteration in the Board's Resolution excluding women students from the regular terms of the College for undergraduate work?
>
> If you feel that you cannot answer this question, I am wondering whether you would make the official records available to me for inspection, so I might make the determination myself.

On July 17, 1959, Mr. Heaton wrote Mr. Barron in reply substantially as follows:

> The official minutes of the Board of Directors do not indicate that the Board has altered its long observed policy of excluding women students from the regular sessions of the College.

On August 19, 1959, the Associate Registrar of A. & M. College, wrote appellant, Miss Allred, substantially as follows:

> Your recent request has been interpreted as an indication that you may wish to enroll at the A. & M. College of Texas. We appreciate your interest but wish to advise that our school is not a coeducational institution. In view of this situation, we are not sending the information as requested in your recent communication.

On August 25, 1959, Mr. Barron wrote Mr. Heaton, as follows:

> "As one of the legal counsel for several women who desire to enter A. & M. College as students dur-

ing the regular sessions, beginning at the next session about to begin. I wish to notify you that the ladies are ready to present their credentials, transcripts of credits and all other information to prove their educational, moral and other necessary qualifications for under-graduate study at the College. This notice is given pursuant to directions in the Bulletin, and we desire that you send all necessary forms, instructions, etc., subject to the following matters contained in this letter.

"As usual, the Bulletin contains the express provision that only male students will be accepted for admission, and we recognize that the College stands upon that provision as a lawful regulation. But we disagree and are ready, and now tender, any and all information and proofs necessary for admission to the school by these ladies, save and except the proof that such applicants are men instead of women.

"Upon your request or notification to me, they shall be glad to furnish names, desired courses of study and any and all information required by the College. In view, however, of the position taken in the past, the women will not perform the vain act of presenting themselves personally at your office, unless you or some authorized officer notifies me that they will be considered for admission regardless of sex, since that bar is at the threshold of this action.

"If the College will accept the women upon proof of qualifications considering the above, please send the necessary applications and instructions and they will be glad to comply with the regulations of the College for admission. At least four applications will be needed. * * *"

In reply to that letter Mr. Heaton, on September 2, 1959, wrote Mr. Barron substantially as follows:

Receipt of your letter of August 25, 1959, is acknowledged. As a courtesy only, and not subject to

any matter or condition, I am transmitting herewith four formal application forms.

On September 3, 1959, Mr. Barron wrote Mr. Heaton substantially as follows:

> Thank you for sending four application blanks. However, since you refuse to state that the women will be considered for admission, as outlined in my letter of August 25, in view of the Resolution excluding them, your letter to me of July 17, 1959, and your absolute refusal to consider Miss Margaret E. Allred by your letter to her of August 19, 1959, it will be necessary to file suit to attempt to remove the bar against women as a class, and subject to the outcome of that suit, the women will again apply for admission. The women involved are Mary Ann Parker, Sarah E. Hutto, Margaret E. Allred and Mildred Barron, all of Bryan, Texas, as well as other women who desire to attend.
>
> We are still ready to submit the proper applications when we are told that the Resolution will not be enforced or when it has been amended, or that the women will be in good faith considered for admission to the next regular fall session, without regard for sex. I consider at present, from past legal experience and from the above letters, that the answer as of today is an unequivocal "No".

Neither appellant filled out and signed the application blanks required by the college for entrance, nor did either appellant present herself in person to the college for admission for any course of study whatsoever but elected, through their attorney, to file this suit without having formally applied for entrance, and without having been rejected.

Appellants went to trial on their original petition and supplemental petition, and in their original petition they alleged in part:

"I. The named Plaintiffs above bring this action for themselves individually, and also as a class action as permitted by law, particularly Rule 42, Texas Rules of Civil Procedure, there being a common question of law affecting higher educational rights of American women, and a common relief is sought for all others similarly situated. The issues and questions herein are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court.

"II. It is alleged that each of the above named Plaintiffs, excepting the pro forma joinder and the Next Friend, are female residents of the State of Texas and each of the Plaintiffs are interested in, and their rights and status are affected by, a statute or resolution promulgated by the Board of Directors of A. & M. College, which bars and excludes all female students from the College, or which purports to do so. The Plaintiffs, desiring to attend or desiring to be considered for admission to A. & M. College without discrimination for undergraduate study, herein attack the Resolution or Regulation barring women from the College as being repugnant to the Fourteenth Amendment to the United States Constitution, and they seek to obtain a declaration that the involved Resolution or Regulation is void and in contravention thereof.

"III. Each Plaintif is interested in the subject matter hereof and the validity or invalidity of the Resolution involved for the following reasons:

"(a) The Plaintiff, Margaret E. Allred, is interested because she is a graduate of an accredited high school and with college credits, and she seeks a Bachelor of Arts Degree with a major in History and Government, and a degree in Floriculture in the School of Agriculture.

"(b) The Plaintiff, Sarah C. Hutto, is interested because she is a graduate of an accredited high school,

and she seeks a Bachelor of Sciences Degree with major courses in Biology or Entomology.

"(c) The Plaintiff, Mary Ann Parker, is interested because she is a graduate of an accredited high school and with college credits, and she seeks a Bachelor of Architecture Degree in the School of Engineering.

"The High School graduates above have completed at least 15 acceptable units, as provided for on Page 54 of the College Bulletin, and the students above with college credits are eligible to return to the original institution, they have a grade point ratio of 1.00 or better, and they are all willing to make the necessary proofs set forth in the bulletin at pages 54-58 thereof, and to pay all necessary fees and expenses after the exclusionary Resolution is no longer a hopeless bar, or alternatively, when the Resolution attacked here is no longer an absolute bar to the admission of women, since it would be vain to attempt the above until the discriminatory Resolution or Regulation is removed by the Court, as hereinafter alleged. All of the Plaintiffs desire undergraduate study at the College, and all women, including Plaintiffs, are now disqualified, in limine, by reason of sex.

"Each of the Plaintiffs alleges that she is in good health and of good character; that each desires to obtain a college education and that A. & M. College is the best, least costly and most convenient and available place for each of them to obtain it. Further, each is willing and able to take all required oaths and comply with any requirements of the college or qualification as a student which are designed for females, including Military, Naval or Air training if courses suitable to women are offered, when they can be considered for admission without sex discrimination."

We think the trial court correctly denied the relief prayed for by appellants (assuming that each applied for

entrance and that each was rejected) for the reason that the exclusion of appellants from the Agricultural and Mechanical College of Texas was not violative of any constitutional right. First of all, each of the appellants desired to attend A. & M. College of Texas because it is more convenient and less costly to appellants than attendance at any other school because it is nearer their home and that if they resided near any other State supported college or university in Texas, they would probably attend the school nearest their home.

That was the exact situation in the case of *Heaton v. Bristol*, Tex. Civ. App., 317 S.W.2d 86, w. ref., certiorari denied 359 U.S. 230, 79 S. Ct. 802, 3 L Ed. 2d 765.

The Agricultural and Mechanical College of Texas is the oldest state supported institution of higher learning, and since the founding of the College it has been operated and universally recognized and accepted as a school for the training and education of young men. The Board of Directors has governed the College with the view that it was vested with discretionary power to exclude female students and the Legislature of the State of Texas, since the beginning of the school, has acquiesced in the Board's concept of its authority. The college is one of seven State supported military colleges in the United States. It is the only State supported military college in the State of Texas. The Military program at A. & M. College differs from the Reserve Officers' Training Program offered at various other state colleges and universities in a number of material respects. The participants in the military program at A. & M. College are organized on a corps basis; the men are organized into military units, and they are constantly under military discipline, twenty-four hours a day, seven days a week. The Texas system of higher education, as it exists today, is comprised of 18 institutions fully

supported by State funds. Each of these institutions, with the exception of A. & M. and Texas Women's University, is open to both sexes and has remained open to qualified members of each sex since the date of founding. The only distinguishing characteristics between the facts in the instant case and the facts involved in *Heaton* v. *Bristol*, are:

(1) In this case plaintiffs, Margaret E. Allred, Sarah C. Hutto and Mary Ann Parker, have brought this suit not only as individuals but have attempted to bring it as a class action, whereas in *Heaton* v. *Bristol*, *supra*, Lena Ann Bristol and Barbara Tittle did not attempt to bring the suit as a class action.

(2) The relief prayed for in the instant case by plaintiffs in the trial court was (a) declaratory judgment, and (b) injunction, whereas plaintiffs in *Heaton* v. *Bristol* prayed for declaratory judgment and mandamus.

(3) The instant case was tried partly on an agreed stipulation of facts, whereas the case in *Heaton* v. *Bristol* was not.

In stipulation 1, we find that Miss Allred (in June, 1959) "*made application for admission to a summer session of the Agricultural and Mechanical College of Texas and stated that the course of study she was pursuing or expected to pursue in the Agricultural and Mechanical College of Texas was law.*" (Emphasis added). There is nothing in the record to indicate that Miss Allred notified the College that she desired to enter for the purpose of obtaining a degree in floriculture. It is true that the plaintiffs, in their original petition on which they went to trial, specifically alleged that Miss Allred is interested because she is a graduate of an accredited high school and with college credits, and she seeks a Bachelor of Arts Degree with a major in history and government, and a

degree in floriculture in the School of Agriculture; that on trial of the case counsel for Miss Allred struck from the pleadings "the allegations for request for a degree in Government and History." But the undisputed fact still remains that the first notice that the college had that Miss Allred desired a degree in floriculture was contained in the original petition. It is true that the plaintiffs alleged in their petition that they bring this action for themselves individually and as a class action but there is absolutely no proof in this record that either of the plaintiffs are authorized to bring this suit for any other person or persons except for themselves. There is absent any proof to the effect that women as a class in the State of Texas desire to be enrolled in the College, and there is no proof that any other woman in Texas, save and except Miss Allred, desires to obtain a degree at the College in floriculture. So, we are of the view that the proof wholly fails to sustain a class action. The foregoing situation exists without dispute as to the other plaintiffs. (Appellants, Hutto and Parker, have wholly failed to show that their status is different from the applicants in *Heaton* v. *Bristol, supra;* however, the applicants in the Bristol case did apply for entrance and were rejected.) Moreover, since Miss Allred made application to attend the summer session on the ground that she desired to pursue a course of study in the college, and that the subject was law, and since she further stipulated that she desired to attend such college because it was more convenient and less costly than any other institution of higher learning, and because it is near her home, and further, that if she resided near any other State-supported college or university in Texas, she would probably attend the school nearest her home; these stipulations being uncontradicted by any evidence, bring her within the exact situation as the applicants in *Heaton* v. *Bristol, supra.* We think the foregoing undisputed factual

situation shows conclusively that Miss Allred's (as well as co-plaintiffs') exclusion from the college was not violative of any of their constitutional rights. It is obvious that appellants, being denied the right to attend the State college in their home town, are treated no differently than are other students who reside in communities many miles distant from any State-supported college or university. The location of any such institution must necessarily inure to the benefit of some and to the detriment of others, depending upon the distance the affected individuals reside from the institution. But, as we understand appellants' contention here, they base their right to relief on the doctrine announced by U. S. Supreme Court in the *State of Missouri ex rel. Gaines* v. *Canada*, reported in 305 U.S. 337, 59 S. Ct. 232, 83 L. Ed. 208. We have carefully considered this case and do not believe that it is applicable and controlling to the undisputed factual situation here before us. The decision in that case was grounded on the factual situation that a Negro in the State of Missouri, who had graduated from Lincoln University, a state institution of Missouri for Negroes, had presented himself for enrollment at the University of Missouri for the purpose of pursuing a law degree (such course not being offered at Lincoln University) and the University of Missouri refused to admit him to the law school solely on the ground that he was a Negro. In other words, here was discrimination solely on the ground of color and or race. That situation is non-existent here.

Moreover, we have this further distinction in the Gaines case and the case at bar. In the Gaines case the applicant made application for admission and the application was refused. In the case at bar, attorney for appellants requested four application blanks which were mailed to counsel, but counsel refused to have the applicants execute the application blanks and present them to the

college on the ground that the resolution here attacked precluded the admission of women. So, here we have an attack made upon the college without the applicants having been refused admission to the college. Can this Court assume that the applicants desire to enter A. & M. College when they do not make application, and when their attorney elects to advise them not to do so? We think the answer is "No." Surely no justiciable controversy is here presented.

We have no way of knowing what the school authorities of the College would have done if Miss Allred had applied for admission to the college for the sole purpose of pursuing a degree in floriculture. It is obvious that if Miss Allred is the only one who desires such a degree, that the management or the Board of Directors would have had authority to make an exception in her case, and we cannot speculate on what would have happened had the college been fully informed of her desires before she filed this suit for relief. In the *Gaines* case, *supra*, the applicant's desire to obtain a law degree was unmixed with any other purposes. Here, Miss Allred desires to attend the college, partly because she is in the vicinity, partly because it is more convenient for her, and partly because it is cheaper, and partly because (she alleges in her pleadings) she desires to obtain a degree in floriculture. So, her purpose to enter the college is not unmixed with other conditions, and we have no way of knowing what she would do or what her desires would be if she lived near other state supported schools. In fact, during the trial, she abandoned stipulation one to the effect that she desired to pursue the study of law. As we pointed out in *Heaton* v. *Bristol*, *supra*, sex, as a basis for legislative classification has been used with considerable frequency in both the statutes of the United States and of the several states. The

range of this legislation covers such diverse subjects as jury service, voting rights, employment in certain pursuits, minimum wage and hour legislation and property rights. See numerous authorities cited on page 99 of 317 S.W.2d. Surely the Supreme Court of the United States will not attempt to interfere with the public policy of the sovereign states of this nation in the management and control of their respective educational systems so long as such systems do not discriminate against color or race. This Court is of the further view that the duty of the United States Government to train its militia for the protection of the public transcends any private desire of any particular citizen in the United States to take a course of study offered at one of the United States military academies, whether that course includes basic military science, veterinary medicine or floriculture. In keeping with the foregoing view, we also think that it is the duty and a function of the State in the exercise of its public policy to provide military training for its youth, if it elects to do so, for the protection of the public, and that this duty and the form it assumes transcends any private desire of any particular citizen to take a course of study offered at its state military college, however desirable its course of study may be.

Finally, we think the trial court erred in permitting this case to be brought as a class action, because appellants failed to show that the named plaintiffs were members of an eligible class and entitled to enroll as students in the Agricultural and Mechanical College of Texas as such. The appellees, in their original answer, averred:

> "Without admitting Plaintiffs' eligibility, independently of sex, to enroll as students in the Agricultural and Mechanical College of Texas, and without admitting the eligibility of members of Plaintiffs' class, independently of sex, to enroll as students in

the Agricultural and Mechanical College of Texas. Defendants further allege that in view of the judicial determinations in Heaton v. Bristol, supra, as alleged in Paragraph III of this answer, Plaintiffs and members of their class are not, as a matter of law, entitled to relief as prayed for in their Original Petition."

The Court overruled appellees' contention here expressed, to which they duly excepted, and the error is cross-assigned.

We have previously stated that the only evidence attempting to show that the named plaintiffs were members of an eligible class (independent of sex) to enroll as students in the college is stated in paragraph three of the agreed stipulations. There we find "All three women plaintiffs are graduates of accredited Texas High Schools." Mr. Heator, Director of Admissions and Registrar at the college testified that graduation from an accredited high school was not the only requirement, independent of sex, permitting enrollment in the college. That statement is undenied and is not challenged.

Subdivision (a) of Rule 42, T.R.C.P. provides:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

> "(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

It is our view that persons bringing a class action under Rule 42 aforesaid, are required to be members of the class and be of sufficient number as will fairly insure representation of all, and such individuals cannot have interests which are antagonistic to the interest of absent parties whom they purport to represent. See McDonald, Texas Civil Practice, 1950 Ed., Sec. 3.34, p. 277; Moore's Federal Practice, 1948 Ed., Sec. 23.04, p. 3418, *et seq.* See also *Hansberry* v. *Lee*, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22.

In *Yett* v. *Cook*, 115 Tex. 205, 281 S.W. 837, 841, our Supreme Court made this statement:

> "* * * It is a rule of universal acceptation that to entitle any person to maintain an action in court it must be shown that he has a justiciable interest in the subject-matter in litigation, either in his own right or in a representative capacity * * *."

As we understand the foregoing Rule we think the petitioners had the burden to introduce evidence in order to establish that they are members of a class eligible (independent of sex) to enroll as students in the college; otherwise they would not be persons constituting a class, and could not, therefore, represent unnamed plaintiffs who would be bound by issues in this case.

It is true that appellants here contend that the class they represent are graduates of accredited high schools; however, this view of appellants represents a view which is antagonistic to the interest of the absent parties to the litigation who seek to maintain a system of higher education in Texas affording a freedom of choice for themselves

between an all-male institution of higher education a all-female institution of higher education, and a co-educational institution of higher education. In other words appellants here seek to change the public policy of this State as to its form of a higher educational system. So again, we say that the appellants have wholly failed to carry their burden of showing that they are entitled to maintain their suit as a class action. Under the record here made we are of the view that the pertinent facts in the record of *Heaton* v. *Bristol* are substantially identical with the pertinent facts in the instant case, and being of this view, we think it is our duty to overrule each of appellants' contentions.

Accordingly, the judgment of the trial court is affirmed.

On Motions for Rehearing

We have given our most careful attention to appellants' motion for rehearing, and after so doing we are of the view that it should be overruled, and it is accordingly overruled.

The appellees have filed their motion for rehearing in which they ask that the paragraph hereinafter quoted be stricken on the ground that the statement constitutes dictum not necessary to the decision or judgment of this Court. We quote such paragraph:

> "Since Miss Allred has never made application to the proper authorities of A. & M. College for admission, in order to pursue a course of study leading to a degree in floriculture; and since the A. & M. College authorities have not had an opportunity to pass on her application for this particular course (which the records show is obtainable only at A. & M. College in our system), we are compelled to take the action

we have as it pertains to Miss Allred. But in view of the decision of our United States Supreme Court in Gaines v. Canada, supra, we feel it is our duty to say that in the event that Miss Allred makes application for admission to A. & M. College to pursue a course of study leading to a degree in floriculture, that she should be permitted to do so, and not be excluded solely on the ground that she is a member of the female sex. We further feel that in view of the Canada case, supra, and the foregoing, that should she so apply, and be otherwise qualified, the authorities of A. & M. College will grant her admission."

After carefully considering appellees' motion we are of the view that it should be granted, and that the Clerk be directed to strike and delete the foregoing paragraph from the opinion handed down on May 19, 1960. Accordingly, appellees' motion to strike is granted, and the Clerk of this Court is directed to strike and delete the foregoing paragraph from such opinion.

Jake Tirey,
Associate Justice.

APPENDIX "B":

Judgment Rendered May 19, 1960.

MARGARET ALLRED ET AL.,
VS.
H. L. HEATON ET AL. } 3760

APPEAL FROM DISTRICT COURT
BRAZOS COUNTY.

OPINION BY JUSTICE TIREY.

Came on to be heard on the transcript of the Record Cause No. 3760, entitled *Margaret E. Allred et al., appellants,* v. *H. L. Heaton et al., appellees,* from Brazos County; and the same being considered, because it is the opinion of the Court there was no error in the judgment, it is adjudged and ordered that the judgment of the trial Court is affirmed. It is further ordered that the appellants, Margaret E. Allred, Anne Allred, Sarah C. Hutto, Mary Ann Parker and Lawrence Parker, Jr., as principals, and John M. Barron and W. S. Barron, as sureties, pay all costs in this behalf expended and this decision be certified below for observance. Opinion by Justice Tirey.

Order Made June 9, 1960, Overruling Appellants' Motion for Rehearing.

Motion No. 7124, Cause No. 3760, *Margaret E. Allred et al., appellants,* v. *H. L. Heaton et al., appellees,* from Brazos County; appellants' motion for rehearing overruled.

Order Made June 9, 1960, Granting Appellees' Motion for Rehearing.

Motion No. 7125, Cause No. 3760, *Margaret E. Allred et al., appellants,* v. *H. L. Heaton et al., appellees,* from Brazos County; appellees' motion for rehearing granted, and the Clerk of this Court is ordered to strike and delete the paragraph in the opinion of this Court handed down May 19, 1960, beginning "Since Miss Allred has never made application * * *" and ending "* * * the authorities of A. & M. College will grant her admission."

APPENDIX "C".

Vernon's Annotated Texas Statutes.

ART. 2607.

The Agricultural and Mechanical College of Texas, located in Brazos County, and by the Constitution made and constituted a branch of the University of Texas, for instruction in agriculture, the mechanical arts and the natural science connected therewith, shall be managed and controlled as herein provided.

ART. 2608.

The leading object of this College shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanical arts, in such manner as the legislature may prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.

ART. 2610.

The government of the Agricultural and Mechanical College shall be vested in a Board of Directors composed of nine persons. Said board shall elect from their number a president of the board, who shall call said board together for the transaction of business whenever he deems it expedient. The board shall have the right to make and use a common seal.

ART. 2613, IN PART.

6. The board shall, also, from time to time, make such by-laws, rules and regulations for the government of said College as they may deem necessary and proper for that purpose, and shall regulate the course of study, the rates of tuition, the manner of performing labor, and the kind of labor to be performed by the students of said College, and shall also prescribe the course of discipline necessary to enforce the faithful discharge of the duties of the professors, officers and students.